Appendix

Certificate of Counsel

I, John F. Wells, hereby certify that I am an attorney at law, licensed to practice in the State of California and admitted to practice before this Court. I am a partner in the law firm of Stark, Stewart, Simon & Sparrowe, 1200 Financial Center Building, Oakland, California 94612, attorneys for respondents in this case. I was the attorney with the primary responsibility for preparing and presenting the case in the District Court, and in the Court of Appeals. I was the principal author of the plaintiffs' brief in both lower courts, and I made the oral argument on behalf of plaintiffs in both lower courts. I prepared the respondents' brief in opposition to the petition for certiorari. After this Court granted certiorari, Mr. Valentine Brookes of San Francisco took over responsibility for the case, and I did not participate significantly in the preparation of the respondents' brief filed in this Court, nor in the oral argument, although I was present in Court and heard the oral argument on December 11, 1972. I have reviewed a transcript of that proceeding.

I hereby certify that the Petition for Rehearing filed herewith is presented in good faith and not for delay, based upon the following facts which are within my personal knowledge:

The original complaints in these cases were filed on December 12, 1965. Thereafter, Mr. John Youngquist, Assistant United States Attorney in San Francisco, conducted discovery proceedings on behalf of the government,

including depositions of key persons from the Permanente Medical Group and Kaiser Health Plan, and examination of all of the files, documents, correspondence, etc., which were deemed by the government's attorneys to be pertinent.

Upon completion of discovery, Mr. Youngquist indicated that he did not expect to raise any factual issues not covered by the written documents evidencing the retirement plan in question, and suggested that it ought to be possible to submit the case for decision on an agreed statement of facts. I was willing to try, and negotiations toward that end were conducted over a period of several months until the Agreed Statement of Facts in its present form was signed and filed on March 2, 1968.

The first proposed drafts of the Agreed Statement was prepared and submitted by Mr. Youngquist on October 6, 1967. It did not contain the subject matter of paragraph 16 of the Agreed Statement as filed. It did contain language, similar to that now found in paragraph 13, that "The Plan was fully integrated and embodied in a written agreement. . . ." It also stated that "It is agreed . . . that the provisions of the trust agreement are complete and that they define and control the rights of the parties to the agreement."

As counsel for plaintiffs, I was not satisfied that the Agreed Statement as proposed would be adequate because it omitted important facts regarding how the plan came into being, and because I was afraid that the Court might think that the plan had been created by the Medical Group partnership to be funded with money which was under its control. I knew this was not true and that the

evidence would prove the contrary. Accordingly, I suggested that we enter into a "Partial Agreed Statement" (and I drafted such a document), which would have allowed for a hearing at which evidence could be introduced on the unstipulated issue. At about the same time, I proposed as an alternative the inclusion in the Agreed Statement of the subject matter which ultimately became what is now paragraph 16. This was one of the last matters to be resolved. When Mr. Youngquist agreed to the inclusion in the stipulation of paragraph 16, I dropped my insistence on presenting oral testimony and having the trier of the fact decide that issue.

I would not have agreed to waive the right to a trial had I thought there was any possibility that the Agreed Statement of Facts would be disregarded or misinterpreted as this Court has now done. I would instead have insisted upon a trial of that fact issue. Among other things, the evidence would have shown—and this evidence is still available—that the amounts paid by Health Plan to fund the plan were arrived at by actuarial estimates of what would be necessary to achieve certain benefit levels, that because of differences among the various medical groups serving Health Plan (primarily in age distributions within the groups and past service) contribution rates differed. For example, the same plan was commenced in Southern California with a contribution rate of six cents per member per month, later increased to seven cents and then to nine cents, whereas the rate in Northern California was twelve cents per member per month. There was never any attempt to equalize this disparity.

At every stage of this proceeding, in the briefs and argument in the District Court, in the Court of Appeals, and in the Brief in Opposition to Petition for a Writ of Certiorari, I have always asserted that paragraph 16 of the Agreed Statement of Facts means that the Medical Group partnership never had any control over the funds that Kaiser Health Plan agreed to pay, and later did pay, into the retirement plan—that these funds were in addition to any income which it could have received currently, and that it never could or would have received these funds in any form other than as payments into this retirement plan. To my knowledge, that interpretation has never been challenged or questioned by any government lawyer at any stage of these proceedings, and so far as I know was accepted as correct by all participants in both lower courts. I know of nothing which has transpired since which should cause this Court to view the facts in any different way.

Under penalty of perjury, I declare that I have examined the above Certificate and to the best of my knowledge and belief it is true and correct.

JOHN F. WELLS

March 21, 1973.